AN INQUIRY INTO THE POWER OF CONGRESS TO REGULATE THE INTRA-STATE BUSINESS OF INTERSTATE RAILROADS.[1]

That government may lawfully regulate the business of common carriers is a proposition not now open to dispute. In the exercise of this governmental power there has arisen in the United States a condition which can hardly be understood by those unacquainted with our dual form of government. We find to-day the government of the United States undertaking to regulate railroads as to their interstate traffic, and the several States undertaking to regulate them as to traffic wholly within the territorial limits of the States respectively. Obviously, there can be no unity of theory, purpose or practice in the separate governmental regulation of forty-six different States, and out of this circumstance arise intolerable confusion and vexation. Nevertheless, the question whether the Congress of the United States has, under the Constitution, the power to regulate the purely intra-state business of an interstate railroad is not to be determined by the convenience or inconvenience which, in practice, the one or the other theory may involve. The question is distinctly one of constitutional power. In reflecting upon this important question, I have reached the conclusion that Congress has the constitutional power to regulate interstate railroads not only with respect to their interstate business, but with respect to their intra-state business as well, and thus to bring such railroads wholly and exclusively under the regulation of the national government. It occurred to me that a statement of the grounds of that opinion might be of interest, inasmuch as a contrary notion prevails among many judges and lawyers, and, perhaps, a majority of the bar will, at first impression, be inclined to think my views not justified by authority.

The power of Congress to regulate railroads to any extent rests, of course, on what is known as the Commerce Clause of the Constitution of the United States:[2]

"The Congress shall have power * * * to regulate commerce with foreign nations, among the several States, and with the Indian tribes."

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[1]Paper read before the Law School of Columbia University, Nov. 11, 1908.

[2]Art. 1, § 8, Par. 3.

It is to be recollected that the government of the United States is a government of enumerated powers, and has only such powers as are granted in the Constitution, all other powers being reserved to the States. The grant of power in the Commerce Clause of the Constitution is "to regulate commerce among the several States;" wherefore, broadly speaking, the power to regulate commerce within a State was not granted to Congress.

The term "commerce" is not defined in the Constitution itself, but the Supreme Court has held it to embrace not alone traffic in commodities, but also all commercial intercourse, including the transportation of passengers, and the transmission of intelligence by the telegraph and the telephone. The power to regulate interstate commerce has been held by the Supreme Court to include the power to regulate the *agency* which carries on the commercial intercourse. As early as 1824 Mr. Justice Johnson, in his concurring opinion in the leading case of *Gibbons* v. *Ogden*[3] said:[4]

"Commerce, in its simplest signification, means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange, become commodities, and enter into commerce; the subject, the vehicle, the agent, and their various operations, become the objects of commercial regulation."

From that day to this it has never been doubted that the power of Congress to regulate commerce among the several States embraces the power to regulate the *agent,* itself, which carries on such commerce. The inquiry we are here pursuing is whether the regulation of the agent which Congress may constitutionally exercise, must be confined to regulations relating solely to so much of the business of the agent as is commerce among the several States, leaving to the States, respectively, the sole power to regulate the agent with regard to so much of its business as is commerce wholly within the States: whether the agent which carries on both interstate and intra-state commerce must, of necessity, under the Constitution remain subject to regulation in part by the United States, and in part by the government of each State in which it may carry on its business.

Whatever confusion exists in the public mind and in judicial decisions about the subject seems to me to arise out of the failure to differentiate the *character* of the various agents engaged in

[3](1824) 9 Wheat. 1.

[4]At page 229.

commerce. The agency which carries on the commerce may be a public agency, or a private agency. Thus, the manufacturer of plows, or of any other commodity, or the merchant engaged in buying and selling any commodity, whose business embraces transactions with citizens of more than one State, may, within the meaning of the Constitution, be an agency of interstate commerce. These, however, are purely *private* agencies of interstate commerce, and the power of regulation reposed in Congress is confined to regulating the agent to the extent, and only to the extent, that the agent is engaged in interstate commerce. But where the agent who carries on the commerce is a *public agent*—a functionary of government—very different considerations are involved. A railroad company is a public agency. It is in a large sense an arm of government. If the manufacturer of plows needs a particular lot of land belonging to another person upon which to build a factory, he must treat with the owner for its purchase, and, if the owner will not sell, the plow-maker must go without the lot. There is no power in government to compel the owner to sell, and this is so because the lot is not required for a *public purpose*. But, on the other hand, if the railroad company need the lot of land for a terminal, for a right of way, or for any other purpose, it may acquire the lot, although the owner absolutely refuses to part with it. Here the government steps in and says the railroad company is a *public agent,* its business is a *public business,* and the purpose for which the land is wanted is a *public purpose*:—wherefore the owner of the land shall be compelled to give up his property in the land, and allow it to be transferred to the railroad company upon the payment by the railroad company of a just compensation. This is the exercise by government of its power of eminent domain. Other powers of government, such as the taxing power, have often been exercised in aid of railroad companies. All this is done upon the sole ground that the railroad company is a *public agent,* engaged in a *public business,* and is by so much a functionary of the government itself.

It is manifest, therefore, that commerce may be carried on by a class of agencies who are purely private agents, and by another class of agencies who are *public agents*—agents of government.

Having proceeded thus far it becomes necessary to point out some of the attributes of the government of the United States. Whilst the Federal government was created by the common consent of the people of the several States, its functions are exercisable

in absolute independence of the governments of the several States. The sovereignty of the United States is an independent sovereignty. Under the Constitution of the United States there is a National Federal State, whose territorial limits are coextensive with those of the aggregate domain of all the States and Territories of the United States. This National Federal State, within its constitutional powers, operates directly upon all the citizens of the United States, without the necessity of employing to any extent or for any purpose any of the functions of the State government. There is a complete sovereignty of the United States. There is a peace of the United States. In *McCulloch* v. *Maryland*,[5] Chief Justice Marshall said:

"The government of the Union, then, * * * is emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."[6]

"No trace is to be found in the Constitution of an intention to create a dependence of the government of the Union on those of the States, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments which might disappoint its most important designs, and is incompatible with the language of the Constitution."[7]

Mr. Justice Brewer, in delivering the opinion of the Supreme Court in the *Debs* Case,[8] said:[9]

"What are the relations of the general government to interstate commerce and the transportation of the mails? They are those of direct supervision, control and management. While under the dual system which prevails with us the powers of government are distributed between the State and the Nation, and while the latter is properly styled a government of enumerated powers, yet within the limits of such enumeration it has all the attributes of sovereignty, and, in the exercise of those enumerated powers, acts directly upon the citizen, and not through the intermediate agency of the State."

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[5](1819) 4 Wheat. 316.
[6]At page 404.
[7]At page 424.
[8](1895) 158 U. S. 564.
[9]At page 578.

This complete independent sovereignty, this Federal National State, has under the Constitution plenary power to regulate commerce among the several States, which embraces the power to regulate the agencies which carry on such commerce. There is no limitation upon this power of regulation granted by the Constitution to the Federal National State. This great power of regulating commerce among the several States having been expressly granted to the National State, without limitation, the grant embraces every power requisite to the exercise of the prime power. It is said in the Federalist:[10]

"A Government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, and the complete execution of the trusts for which it is responsible, free from every control but a regard to the public good and the sense of the People."

Referring again to the great leading case of *Gibbons* v. *Ogden*,[3] we find Chief Justice Marshall employing this language with reference to the Commerce Clause of the Constitution:

"If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States." [11]

The power to regulate commerce among the several States having been committed to the United States by the people of the United States, which power includes the power to regulate the agencies that carry on such commerce, the United States being an independent sovereignty—a Federal National State—and a railroad company being a public agency—an arm of government—the conclusion that Congress has the constitutional power to pass an act incorporating a railroad to engage in interstate commerce necessarily follows: that is to say, Congress has the power to create a *public agency* to carry on interstate commerce. Perhaps the most notable instance of the exercise of this power by Congress is found in the act incorporating the Union Pacific Railroad Company, passed in 1862. That Congress has such power is not now open to dispute.

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[10]The Federalist, No. XXX., (Dawson's Ed.) 194.

[11]At page 197.

Let us proceed a step further: not only has Congress the power to incorporate a railroad company to engage in interstate commerce, but it has also the power to grant to such an incorporated company the power of condemning private property to the use of the railroad company, and thus to allow the railroad company to employ one of the great powers of the national government—the power of eminent domain. When such power is granted to a railroad company, the power is not to be exercised through any agency of a State government, but independently of any agency of a State government, and directly and exclusively under the independent sovereign power of the United States.[12]

Having determined that the United States is an independent and sovereign government, with respect to the powers confided to it by the Constitution; that the Constitution granted to the Congress of the United States the power to regulate commerce among the States, which includes the power to regulate the agencies carrying on such commerce; that a railroad company is a public agency —an arm of government; that the Congress of the United States may create a railroad company to engage in interstate commerce, and grant to it the power of condemning private property for its use, we are prepared to proceed with the inquiry whether the *public* agency engaged in both interstate and intra-state commerce, is in any wise different from the *private* agency, similarly engaged, and whether both alike must remain subject to regulation in part by the United States, and in part by the government of each State in which they may, respectively, carry on their business. That the private agency of interstate commerce must remain under such dual control, there can be no doubt. But that is not true of the *public* agency, because the public agency is a *functionary of government.* Of what government is the interstate railroad company a functionary? Manifestly, it is a functionary of the independent sovereign National State—the government of the United States.

Whenever a public agency falls within the sovereignty of a State government, it is an agency of that government, and the power of regulation rests wholly with the State government, without the possibility of the slightest interference from the government of the United States, unless the exercise of the power of regulation by the State violates, in practice, some right guaranteed by the Federal Constitution.

[12]You will find these principles firmly established by the opinions of the Supreme Court in the cases of Kohl et al. *v.* United States (1875) 91 U. S. 367; Luxton *v.* North River Bridge Company (1894) 153 U. S. 525.

On the other hand, whenever a public agency falls within the sovereignty of the United States, Congress has plenary power of regulation without the possibility of the slightest interference by any State government.

So long as a railroad company owns and operates lines of railroad wholly within the territorial limits of a single State, and does not engage in interstate commerce, the government of that State has the exclusive power of regulation in every respect in which a government may exercise such power. But the moment its lines of railroad cross the State boundary, and enter into the territory of another State, and the company carries on interstate commerce, the sovereignty with respect to governmental regulation instantly shifts to the government of the United States, and that government has the full power of regulation with respect to all the operations of the company, whether interstate or intra-state operations. In other words, in the one case the carrier is a functionary of the State government and, as such, subject to State regulation; in the other case the carrier is a functionary of the government of the United States and, as such, subject, potentially, to exclusive regulation by the government of the United States. It is monstrous that two separate independent governments should at the same time have the power of regulating, independently, the same public agency, although the spheres of regulation cover separate classes of business. It is intolerable to suppose that the sovereign Nation—the United States—may not in every phase and aspect control and regulate its own functionaries without the slightest let or hindrance from any State government. It is incompatible with the sovereignty of the United States that any other government should have the absolute independent power of controlling to any extent or in any way any of the agencies of the government of the United States. Sovereignty implies at least the power of full control of all government agencies without any outside interference. If the power be denied to the government of the United States to control its own agencies to every extent and in every way in which such agencies may be controlled by government, then the sovereignty of the government of the United States is thereby denied.

Vattal thus defines a sovereign state:[13]

"Every nation that governs itself, under what form soever, without dependence on any foreign power, is a *Sovereign State.*

[13]Vattel, Law of Nations (Chitty's Ed.) 2.

Its rights are naturally the same as those of any other State. Such are the moral persons who live together in a natural society, subject to the law of nations. To give a nation a right to make an immediate figure in this grand society, it is sufficient that it be really sovereign and independent, that is, that it govern itself by its own authority and laws."

Judge Story's definition of "sovereignty" is as follows:[14]

"By 'sovereignty' in its largest sense is meant, supreme, absolute, uncontrollable power, the *jus summi imperii,* the absolute right to govern."

Again let it be said that the government of the United States is a sovereign National State. When it comes to the granted powers of government, and the agencies of government growing out of or arising under the granted powers, there is no duality under the Constitution. In some quarters there is concurrent jurisdiction or power, but whenever, in such cases, the United States assumes jurisdiction or acts in the premises, then there is an end of State jurisdiction and State power. The Constitution and laws of the United States are the supreme law of the land.

The several States now have power to regulate the Federal agency with respect to its intra-state State traffic, only because Congress has not yet seen fit to exercise its full powers. Whenever Congress shall fully occupy the entire scope of its powers, all State statutes regulating the intra-state traffic of interstate railroads will be instantly suspended, and all governmental friction resulting from diverse and inconsistent legislation will be avoided.

It is wholly unimportant in the application of the principles here stated whether the interstate railroad company is incorporated under State laws or by act of Congress; in either case it is equally an agency of the government of the United States, because it is an agency of interstate commerce, over which Congress has the power of regulation. The power of Congress to control the instrumentality is not dependent upon the mode in which the instrumentality was created.[15]

Up to this time, except in the case of the original Employers' Liability Act, Congress has enacted no legislation regulating interstate carriers with respect to their intra-state business. The Inter-

[14]Story on the Constitution, § 207.

[15]This proposition is fully established by the decisions of the Supreme Court in the cases of Hale *v.* Henkel (1906) 201 U. S. 43; The Northern Securities Case (1904) 193 U. S. 197; and New York, New Haven R. R. *v.* Interstate Com. Com. (1906) 200 U. S. 361.

state Commerce Act in its terms excluded from its operation the business of interstate carriers done wholly within a State, and, likewise, all other legislation of Congress relating to this subject, except in the instance above referred to, expressly related only to the interstate business of interstate carriers. Under these conditions the Supreme Court has held that the States, respectively, have the power to regulate interstate carriers as to their intra-state business, not at all because Congress has not power to regulate them in that regard, but solely because Congress has not undertaken to do so. While the Federal power lies dormant, the States have the power, but this power is instantly suspended the moment Congress acts.[16]

In *Reagan* v. *Mercantile Trust Co.*,[17] it was contended that the State of Texas had no power to regulate the business of the Texas & Pacific Railway Company, done wholly within that State, solely on the ground that the Railroad Company was incorporated by act of Congress. In other words, the contention was that inasmuch as Congress had created the agency of interstate commerce, by incorporating the Company, therefore the State of Texas was without power to regulate the Company with respect to its business done wholly within that State. The Supreme Court held that the mere fact that the Company was incorporated by act of Congress did not deprive the State of Texas of the power to regulate the business of the Company done wholly within that State, for there was nothing in the act of Congress indicating an intent to remove the Company from State regulation. The opinion concedes, although it may be said that the concession was for the sake of argument, that Congress had the power to remove the corporation in all its operations from the control of the State. It cannot be said that this case absolutely decides the proposition that Congress had the constitutional power to regulate the Texas & Pacific Railway Company with respect to its business done wholly within the State of Texas, but it is certain that the case does not decide that Congress did not have such power; and the decision was made to turn on the fact that Congress had not provided in the act of incorporation for the regulation of such business.

In the later case of *Smyth* v. *Ames*,[18] the Supreme Court was

[16]This principle is illustrated in the opinion of Chief Justice Marshall in Willson *v.* The Blackbird Creek Marsh Co. (1829) 2 Peters 245, and in numerous subsequent decisions of the Supreme Court.

[17](1894) 154 U. S. 413.

[18](1898) 169 U. S. 466.

called on to decide whether the State of Nebraska had the power to regulate the rates to be charged by the Union Pacific Railway for the transportation of freight on its lines between points within the State of Nebraska. The Union Pacific Company is a corporation formed by the consolidation of several companies under the authority of acts of Congress, one of the constituent companies being the Union Pacific Railroad Company incorporated by the act of Congress of July 1, 1862. It was contended that certain language employed in the act of Congress relating to earnings, expenditures, and rates, should be construed as a reservation by Congress to itself of the exclusive control of rates, interstate and local, to be charged by the Union Pacific Railroad. Manifestly, if Congress had no constitutional power to make such a reservation, it would be idle to enter upon an extended analysis of the act to determine whether such reservation was intended to be made. Nevertheless, the Supreme Court carefully construed the act and determined that Congress did not intend to reserve to itself the exclusive power of controlling local rates. In concluding this subject, the Court said:[19]

"On the contrary, the better interpretation of the act of July 1, 1862, is that the question of rates for wholly local business was left under the control of the respective States through which the Union Pacific Railroad might pass, with power reserved to Congress to intervene under certain circumstances and fix the rates that the corporation could reasonably charge and collect. Congress not having exerted this power, we do not think that the national character of the corporation constructing the Union Pacific Railroad stands in the way of a State prescribing rates for transporting property on that road wholly between points within its territory. Until Congress, in the exercise either of the power specifically reserved by the eighteenth section of the act of 1862, or of its power under the general reservation made of authority to add to, alter, amend or repeal that act, prescribes rates to be charged by the railroad company, it remains with the States through which the road passes to fix rates for transportation beginning and ending within their respective limits."

This opinion of the Supreme Court does hold, in effect, that Congress had the power when it passed the act incorporating the Union Pacific Railroad Company, to reserve to itself the right to regulate the rates for transporting property between points within a State, and that Congress has the power whenever it wishes to exercise this reserved right, and to regulate such rates. The case,

[19]At page 522.

therefore, holds that Congress has the constitutional power to incorporate an interstate railroad company, and provide for the regulation of rates to be charged by the company for the transportation of property between points within a State.

It has been shown that the Supreme Court has held distinctly that the mode of creating an instrumentality of interstate commerce in no fashion affects the power of the Federal government to regulate it; that this power, under the Constitution, exists in the Federal government equally in the case where the instrumentality is created by the Congress of the United States. Wherefore, the conclusion results that Congress has the constitutional power to regulate all interstate railroads with respect to their intra-state business, as well as with respect to their interstate business; and this on the ground that such railroads are *public* functionaries and agents of the Federal government.

It will be observed that all I have said is made to relate to railroads only, and not to common carriers indiscriminately. I apprehend that there may be interstate common carriers who are not in the sense I have pointed out public agents, carriers in whose interest government may not constitutionally exercise any of its prime functions, such as the power of eminent domain, or the taxing power. The law of common carriers had its origin at a time when railroads were unknown and undreamt of. Such carriers, although in some measure subject to governmental regulation, may not be *public agents* in the sense in which the railroad company is a public agent. They may not be a part of the government, as are railroad companies.

The act of Congress known as the Interstate Commerce Act was made exclusively applicable to common carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, when both are used under a common control, management or arrangement for a continuous carriage or shipment. The act expressly excluded any application of its provisions to business done by a railroad company wholly within one State. This act of Congress may, therefore, be regarded as a strictly railroad law, applicable only to the interstate business of interstate railroads.

The act of Congress of June 11, 1906, commonly called the Employers' Liability Act, was not confined in its operation to railroad companies, but, broadly, to all common carriers engaged in interstate commerce. Thus, the act embraced all persons and

corporations engaged in interstate commerce, howsoever the business may be carried on. Its provisions seemed to apply not only to employees engaged in the interstate business of the carrier, but also, to employees engaged strictly in the intra-state business of the carrier: that is to say, to all employees of the carrier, indiscriminately.

In the cases of *Howard* v. *Illinois Central Railroad Company*, and *Brooks, &c.*, v. *Southern Pacific Company*,[20] the Supreme Court on January 6th, 1908, held the act of June 11, 1906, unconstitutional. The opinion of the Court was delivered by Mr. Justice White, and concurred in by Mr. Justice Day. Mr. Justice Peckham wrote a separate concurring opinion, and in this separate opinion Chief Justice Fuller and Mr. Justice Brewer joined. Mr. Justice Moody, Mr. Justice Harlan and Mr. Justice Holmes each wrote separate dissenting opinions, and Mr. Justice McKenna concurred in the dissenting opinion of Mr. Justice Harlan. The judgments of the lower courts were that the act was unconstitutional. The Supreme Court affirmed these judgments, five of the Justices holding the view that the act was unconstitutional, and four holding the view that it was constitutional.

This case can hardly be said to be an authority against the proposition that Congress has power to regulate interstate railroad companies, in every respect in which they may be regulated by government, both with regard to their interstate and intrastate business. It is true that Mr. Justice Moody made the following statement in the dissenting opinion delivered by him:[21]

"At the threshold I may say that I agree that the Congress has not the power directly to regulate the purely internal commerce of the States, and that I understand that to be the opinion of every member of the court."

This must be regarded as a broad statement of a general rule applicable to commerce carried on by private agencies. It cannot be regarded as denying to the government of the United States the exclusive power to regulate its own governmental functionaries.

An analysis of the several opinions and dissenting opinions of the Justices of the Supreme Court in this case would unduly prolong this discussion, and I must content myself with the suggestion that the case cannot be justly regarded as authority against the proposition which I have endeavored to maintain.

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[20](Sub. nom.) The Employers' Liability Cases (1908) 207 U. S. 463.

[21]At page 505.

Upon the grounds which I have outlined I believe Congress has power under the Constitution to regulate interstate railroad companies in every respect in which they may be lawfully regulated by any government.

The rapid evolution and practice of governmental regulation in its application to our railroad systems has reach the point where it is necessary, in order to avoid the disastrous confusion which results from diverse independent legislation of the several States, that the Congress of the United States should exercise its full power of regulation, and enact such legislation as may be needful to remove interstate railroads from all State regulation.

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